COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

September 17, 2008

In the Matter of
Beechwood Knoll School

OADR Docket No. WET-2008-050
DEP File No. 59-1163
Quincy

RECOMMENDED FINAL DECISION

This matter is an appeal of a Superseding Order of Conditions ("SOC") issued under the Wetlands Protection Act, M.G.L. c. 131, §40 (the "Act") and 310 CMR 10.00 *et seq*. (the "Wetlands Regulations") by the Northeast Regional Office of the Department of Environmental Protection ("MassDEP" or "the Department"). The Department issued the SOC on June 12, 2008 to the Applicant Beechwood Knoll School regarding its proposed construction at the Beechwood Knoll School at 225 Fenno Street in Quincy (the "Property"). On June 26, 2008, the Office of Appeals and Dispute Resolution ("OADR") received this appeal by William G. Aylward purportedly on behalf of ten named Quincy residents (the "Petitioner"). The appeal was a Notice of Claim that claimed only that the Department had erred in its delineation of salt marsh on the Property because it did not use the FEMA base flood elevation line as the boundary of such marsh.

After review of the Notice of Claim, it was clear that there were a number of serious deficiencies in the document, more specifically: (1) the Petitioner failed to produce sufficient evidence that it had standing to request an adjudicatory hearing; (2) the Petitioner failed to file required and important documentation to validate the members of the resident group and the legitimacy of the authorized representative; and (3) the Petitioner failed to allege any clear error on the part of the Department under the requirements of the Wetlands Protection Act, M.G.L. c. 131, §40 or the Wetlands Regulations at 310 CMR 10.00 et seq., since the Wetlands Regulations require use of the spring tide line, not the FEMA base flood elevation line, to delineate salt marsh resource areas. See, 310 CMR 10.32.

On June 30, 2008, to give the Petitioner, who is not represented by legal counsel, an opportunity to address the deficiencies in its Notice of Claim with respect to standing, designation of authorized representation and failure to state a claim, I issued an Order for a More Definite Statement. I also postponed the Pre-Screening Conference due to the parties' scheduling issues and to allow Petitioner time in which to respond to the Order. In that Order, I directed the Petitioner to submit to OADR and serve copies upon all parties on the attached Service List the following documents and evidence:

1. Documents providing information of the name, complete address, phone, fax and email of each member of the ten resident group as required in 310 CMR 10.05(7)(j)2.b.;
2. Documents showing what members of the ten resident group, if any, participated in prior proceedings in this matter as required by 310 CMR 10.05(7)(j)2.a and 10.05(7)(j)2.b.iv This prior participation must consist of written statements to the conservation commission prior to the close of

the public hearing, a written request signed by identifiable members to the Department requesting the SOC or written information sent to the Department during the pendency of the SOC proceedings;

3. A Notice of Appearance by Mr. Aylward as the authorized representative of the ten resident group containing his name, complete address, phone, fax and email along with original affidavits from each member of the ten resident group affirming that Mr. Aylward is duly authorized to represent that member in this adjudicatory proceeding, as is required for any individual who is not an attorney and who files a pleading on behalf of a group of persons asserting party status. See, 310 CMR 1.01(2)(b).

4. A restatement of the claim by the Petitioner alleging a clear error on the part of the Department and how it is "inconsistent with 310 CMR 10.00 and does not contribute to the protection of the interests identified in the Wetlands Protection Act, M.G.L. c. 131, §40, including reference to the statutory or regulatory provisions the Party alleges has been violated by the [SOC], and the relief sought, including specific changes desired in the [SOC]…" See, 310 CMR 10.05(7)(j)2.b.v.

5. Evidence or an offer of evidence through the testimony of a proposed competent witness on the alleged error by the Department, e.g., a proposed expert witness who would testify that the Department did not properly identify the boundary of the salt marsh on the Property per the Petitioners' allegations under the standards of 310 CMR 10.32.

In response to this Order, on July 10, 2008, Mr. Aylward filed a response in which: (1) he stated that he was not the authorized representative of the Petitioner's group, despite having prepared, signed and filed the Notice of Claim on behalf of the group; (2) he filed signatures and a statement of intent to file the appeal by ten entirely different individuals, with the exception of Mr. Aylward himself, than the ten individuals that he alleged had the intent to request an adjudicatory hearing in the original Notice of Claim;[1] (3) he failed to file any further explanation of the substantive claim that there was error in the Department's SOC; and (4) he failed to submit any evidence or to make any offer of proof relating to such alleged error.

On July 16, 2008, the Department filed a motion seeking a further order to show cause from the presiding officer on the grounds that the Petitioner's response to the June 30, 2008 Order was deficient and that the existence of a legitimate group of ten residents prior to the filing of the Notice of Claim was in serious question. I agreed. On July 18, 2008, I issued an Order to Show Cause Why The Appeal Should Not be Dismissed. In this Order, I directed the Petitioner to file evidence of the existence of the group of originally pleaded ten individuals who had purportedly lodged the Original Notice of Claim and to file evidence that this same group of ten individuals authorized Mr. Aylward, prior to June 26, 2008, to file the Notice of Claim on their behalf, since none of them signed the Notice of Claim, other than Mr. Aylward. I also gave the Petitioner yet another opportunity to file an explanation of how the Department erred in its SOC decision and to make an offer of proof of how that error would be shown at a hearing.

[1] The June 26, 2008 Notice of Claim contained a list of residents of Quincy as members of Petitioner's group as follows: John Cleary, Robert Grant, Laura Costa, Christine Zupkofska, Toni Reynolds, Philip Adams, Mary Ann Sherlock, Kathleen Barkas, Nina Nunez and Mr. Aylward. The responsive document filed by Mr. Aylward on July 10, 2008 contained a signed statement of intent to file the June 26, 2008 Notice of Claim by Joan Keefe, Louise Keefe, Maureen Linanne, Hassan Haydi(rest of last name illegible), Stephen DeAngelis, Paul Keyes, Laura Rooney, Judith Hawken, David Cox, Elizabeth Sims, Nancy Stone and Mr. Aylward.

On July 25, 2008, Mr. Aylward filed a response to the July 18, 2008 Order in which he again denied his authority to make any filings on behalf of the Petitioner's group. Mr. Aylward failed to respond to any of the requests for proof of the existence of the original ten residents' group. He also failed to file any further explanation of or proof of Petitioner's legal claim of error. Instead, Mr. Aylward asked for further delay in the matter on the grounds that many persons were on vacation and he was attempting to pursue settlement discussions.

On July 30, 2008, I issued an Order to Show Cause in which, again, I postponed the Pre-Screening Conference, but not the date of hearing, and in which, again, I directed the Petitioner to prove the existence of a valid group of ten residents with standing to appeal, to make a clear decision on whether the Petitioner's group wanted to proceed with an authorized representative or not and to file a clear statement of the Department's error in its SOC and an offer of proof for how that error would be proved at hearing.

On August 14, 2008, Mr. Aylward filed a document, which, was, for the third time, unresponsive to the directives of the three Orders to establish standing of the Petitioner's group and to state a clear claim for relief. Only one of the other Petitioner members named in the original Notice of Claim contacted OADR, Ms. Laura Costa, and her communications were contradictory and not complete. Therefore, on August 14, 2008, I issued an order of stay to enable time for the issuance of a Recommended Final Decision.

Lack of Proof of Ten Residents with Intent and Standing to Appeal

The provisions of 310 CMR 10.05(7)(j) (effective October 31, 2007) govern appeals of SOCs such as the Petitioner's appeal in this case. Under Section 10.05(7)(j)2.a, various listed persons may file a notice of claim to challenge the issuance of an SOC. The Petitioners claim to be a ten resident group, and, indeed, under the regulations "any ten residents of the city or town

where the land is located." are granted a right to request an adjudicatory hearing.[2] This right is not unconditional, however. A ten resident group must submit information on the name and address of each individual, their intent to file the appeal and proof of previous participation in permit proceedings that were the subject of the notice of claim. See, 310 CMR 10.05(7)(j)2.a and 310 CMR 10.05(7)2.b.iv. Petitioner here has not submitted complete information on the names, addresses and other information about the members of Petitioner's group. Petitioner has filed no evidence of the group's intent to file the appeal prior to the June 26, 2008 filing of the Notice of Claim. Petitioner has also failed to file any proof of previous participation by the group members.

To the contrary, when Petitioner's standing was challenged, Mr. Aylward, filed documents claiming that an entirely different set of ten individuals constituted the Petitioner's group. This is untenable. There must exist at the time of the filing of a Notice of Claim a group of ten identifiable individuals who have decided collectively to file a request for an adjudicatory hearing. This is fundamental to standing for a ten residents group as articulated in the Matter of Massachusetts Water Resource Authority (Blue Hills Covered Storage Project):

> A ten residents group could have been recognized from among the ranks of the ten citizens group if the citizens group had included at least ten Quincy residents**.** *See* Duffy Brothers, 6 DEPR at 167. It included fewer than ten Quincy residents**,** however, and as a result, there was no group of ten residents that can be said to have appealed initially, and there was, thus, no appeal by a ten residents group that other residents could join. The initial lack of ten residents was a jurisdictional defect that cannot be cured, *nunc pro tunc*, by bootstrapping new residents onto a group that lacked the requisite numerosity and thus lacked standing to appeal in the first place. *See* Matter of Mitchell, Docket No. 98-169, Decision on Motion for Reconsideration, 6 DEPR 231, 233 (November 29, 1999) (ten citizens group's motion to intervene in wetlands permit appeal brought by petitioner who lacked standing to do so; because petitioner's appeal was jurisdictionally defective, for lack of standing**,** there was no valid appeal in which to intervene).

[2] The other parties with standing to file a notice of claim challenging an SOC are: (1) the applicant; (2) a landowner (the owner of record of the land or an interest in the land that is the subject of the SOC); (3) the local conservation commission or (4) an aggrieved person if previously a participant in the permit proceedings.

See, Matter of Massachusetts Water Resource Authority (Blue Hills Covered Storage Project), Docket No. 2003-166, Decision and Order on Motions to Dismiss (July 8, 2004); *see also* Matter of Duffy Brothers Management Co., Inc., Docket No. 98-088, Final Decision, 6 DEPR 159 (August 29, 1999).

In this case, from the record, there is no proof that any individual, other than Mr. Aylward and a Ms. Laura Costa, who sent an informal email to OADR, had any intention to file the Notice of Claim.[3] The attempt by Mr. Aylward to substitute an entirely different group of ten residents called into question the legitimacy of the entire Notice of Claim. The fact that eight of the named individuals have not responded with any communication at all to the OADR, despite direct service of two of the Orders to Show Cause upon them, means that there is no proof in the record that any of these eight residents had any intention of filing the June 26, 2008 Notice of Claim. Mr. Aylward's actions in this matter are especially suspect as he has engaged in similar conduct in another recent appeal. *See*, Matter of City of Quincy, Docket No. 2007-028, Recommended Final Decision (April 10, 2007), adopted by Final Decision (April 12, 2007).

Standing is jurisdictional and may be raised at any time by the Presiding Officer. *See*, Matter of Steven and Diane Miers**,** Docket No. DEP-04-434, Recommended Final Decision (March 11, 2005), adopted by Final Decision (March 30, 2005). An appeal may be dismissed upon jurisdictional grounds where evidence fails to support claims of standing. *Id.* An appeal may be dismissed upon jurisdictional grounds where evidence fails to support claims of standing. *Id.; see also*, Higgins v. Dept. of Environmental Protection, 64 Mass. App. Ct. 754; 835 N.E.2d

[3] Ms. Laura Costa sent two contradictory emails to OADR. In one she asked not to participate. In another, she asked to participate and supported Mr. Aylward as an authorized representative. Since, in one of these emails, Ms. Costa claimed to support the appeal, I am giving the benefit of the doubt to Petitioner at this early stage of proceedings that she did intend to file the appeal, even though her statement was not in the form of an affidavit, as directed in my orders.

610; 2005 Mass. App. LEXIS 961 (October 13, 2005) (Demonstration of proof of compliance with Department's regulatory requirements for standing in 310 CMR 9.00 *et seq*., including prior participation requirement, recognized as prerequisite for right to adjudicatory hearing by Court of Appeals. These requirements are nearly identical to those in the wetlands regulations at 310 CMR 10.00 *et seq*.).

Lack of Authority for Mr. Aylward to File the Notice of Claim

There was no affirmation filed by the residents to designate a representative for this appeal, although Mr. Aylward had filed the appeal on behalf of the entire group. See, 310 CMR 1.01(2)(a) and 1.01(2)(b). In fact, after filing the Notice of Claim Mr. Aylward repeatedly submitted filings in which he rejected his status as an authorized representative with authority to make filings on behalf of the group. He claimed status as a "contact person." This is not a recognized status under the Adjudicatory Proceeding regulations, as I informed the Petitioner's group. If a group choses not to designate an authorized representative or hire legal counsel, then they must all sign filings and must appear at the pre-screening conference. The identified group of ten individuals never filed a response, with the exception of Ms. Costa's contradictory email communications. Even Ms. Costa's response was not in the form of an affidavit as required. Nor did the group chose to designate any authorized representative. Therefore, all of Mr. Aylward's filings, including the Notice of Claim, were not properly authorized as required by the Adjudicatory Proceeding regulations. See, 310 CMR 1.01(2)(a) and 1.01(2)(b).

Lack of a Clear and Concise Statement of Alleged Error

Ten resident groups, like all Petitioner groups, must also include enough information in the notice of claim to establish that they have made a claim on which relief may be granted. The following information is required to be contained in a notice of claim:

> v. a clear and concise statement of the alleged errors contained in the [SOC] and how each alleged error is inconsistent with 310 CMR 10.00 and does not contribute to the protection of the interests identified in the Wetlands Protection Act, M.G.L. c. 131, §40, including reference to the statutory or regulatory provisions the Party alleges has been violated by the [SOC], and the relief sought, including specific changes desired in the [SOC]…

310 CMR 10.05(7)(j)2.b.v. Petitioner has the burden of going forward to state a clear claim that the Department erred and the burden of going forward to establish some credible evidence from a competent source. 310 CMR 10.05(7)(j)3.b and 10.05(7)(j)3.c.

Petitioner here did not make a clear claim of error on the part of the Department. Petitioner alleged only that the Department erred in its assessment of the location of salt marsh on the Property because it did not use the FEMA base flood elevation line as the boundary line for the salt marsh resource area. Under the Wetlands Regulations, there is absolutely no basis for claiming that the FEMA base flood elevation line would have anything whatsoever to do with the boundary for delineation of salt marsh. In the Wetlands Regulations, the border of a salt marsh extends up to the highest high tide line, which is defined as the spring tide line in 310 CMR 10.32(2). The spring tide line is defined as "the tide of the greatest amplitude during the approximately 14-day tidal cycle." See, 310 CMR 10.32(2). Petitioner has failed to explain, after being given three opportunities to do so, why the FEMA base flood elevation bears any relationship to the spring tide line.[4] Petitioner has failed to allege clear error on the part of the

[4] The standard for delineation of salt marshes also includes a consideration of vegetation. Petitioner also failed to allege any error on the part of the Department about this second vegetative component of the standard for delineation of this salt marsh. Therefore, Petitioner's claim of error was also dubious for this omission as well.

Department. An appeal notice that does not state clear error on the part of the Department may be dismissed. See, 310 CMR 10.05(7)(j)2.c. In this situation, the Petitioner's Notice of Claim must be dismissed for failure to state a claim in accordance with prior decisions of this forum. In accordance with the standards for dismissal for failure to state a claim as articulated recently by the Supreme Judicial Court of this Commonwealth in its adoption of the federal dismissal standards in this context:

> While we have concluded that the plaintiffs' complaint is insufficient on the basis of the standard described in Nader v. Citron, 372 Mass. 96, 98 (1977), see note 7, supra, we take the opportunity to adopt the refinement of that standard that was recently articulated by the United States Supreme Court in Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955 (2007). *See* Eigerman v. Putnam Invs., Inc., 450 Mass. 281, 286 n.7 (2007) (noting that this court may consider adopting Bell Atl. Corp. standard for evaluating adequacy of complaint challenged by motion to dismiss for failure to state claim pursuant to rule 12 (b)(6)).
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> The Supreme Court ruled that the often-quoted language in Conley v. Gibson, 355 U.S. 41, 45-46 (1957) -- "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief" -- had "earned its retirement." Bell Atl. Corp. v. Trombly, 127 S. Ct. at 1969. The Court pointed out that under Conley's "no set of facts" standard, "a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery." *Id*. at 1968. As the Court stated, "While a complaint attacked by a . . . motion to dismiss does not need detailed factual allegations . . . a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions . . . . Factual allegations must be enough to raise a right to relief above the speculative level . . . [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact) . . . ." Id. at 1964-1965. What is required at the pleading stage are factual "allegations plausibly suggesting (not merely consistent with)" an entitlement to relief, in order to "reflect[] the threshold requirement of Fed. R. Civ. P. 8(a)(2) that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'" *Id.* at 1966.

Iannachinno v. Ford Motor Co., 451 Mass. 623; 888 N.E.2d 879; 2008 Mass. LEXIS 331 (June 13, 2008). Petitioner's notice of claim must fail under this standard. Petitioner has failed to demonstrate that in the facts and circumstances of this particular case, the FEMA base flood elevation would be relevant to determining the location of the spring tide line to delineate the

boundary of the salt marsh at issue. Petitioner failed even to make an offer of testimony or other proof of the relevancy of the FEMA base flood elevation.

Therefore, Petitioner has alleged no claim on which relief can be granted in this forum, and Petitioner has failed to establish the existence and standing of Petitioner's resident group to file a notice of claim with respect to the Department's SOC. For all these reasons, I recommend that the Petitioner's appeal be dismissed.

NOTICE- RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for her Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(e), and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in her sole discretion, directs otherwise.

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Laurel A. Mackay
Presiding Officer